(10)

No. 88-32.

In the
Supreme Court of the United States.

October Term, 1988.

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

RICHARD N. MORASH,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS.

Reply Brief for Petitioner.

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The petitioner, the Commonwealth of Massachusetts, submits this brief in reply to the briefs filed by respondent and *amici curiae*.[1/] In this reply, the petitioner will demonstrate (1) that the Bank's agreement to pay employees for unused vacation time does not constitute an "employee benefit plan" covered by ERISA and (2) that the respondent's and the Solicitor General's interpretation of the exemption for "generally applicable criminal laws" provided by ERISA § 514(b)(4), 29 U.S.C. § 1144(b)(4), is highly problematic,

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1/ References to respondent's brief shall be cited as (Resp. Br.), to petitioner's initial brief as (Pet. Br.), to the brief of the AFL-CIO as *amicus curiae* as (AFL-CIO Br.), to the brief filed by the Solicitor General for the United States as *amicus curiae* as (S.G. Br.), to the brief of the various states participating as *amici curiae* as (St. Br.), and to the Appendix to the Petition for Certiorari as (Pet. App.).

and their fears concerning the breadth of the petitioner's approach are unfounded.

ARGUMENT

I. THE BANK'S AGREEMENT TO PAY WAGES FOR UNUSED VACATION TIME IS NOT AN ERISA EMPLOYEE BENEFIT PLAN.

A. Respondent Fails to Explain Why Money Owed For Work Performed During Time That Could Have Been Spent On Vacation But Instead Was Spent Working Is A "Vacation Benefit" and Not Wages.

The payments at issue in this case became due, pursuant to the Bank's agreement, because the Bank's employees worked during time they could have taken vacation. Thus, the legal issue presented is whether compensation paid for time an employee does not spend on vacation but instead works for the employer is a "vacation benefit" under ERISA

§ 3(1) or is compensation for time actually worked.2/ The petitioner, the Secretary of Labor, and the Solicitor General contend that such compensation is closely akin, if not identical, to wages owed for work performed in the ordinary course. Respondent, on the other hand, says that such payments are "vacation benefits" because the duty

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2/ Although "vacation benefits" are among the benefits specified in § 3(1), the term is not defined anywhere in the statute. Nor are its contours given any definition by ERISA's extensive legislative history. The official legislative history of ERISA is contained in a three-volume, 5300-page publication prepared by the Senate Subcommittee on Labor and Public Welfare and contains no substantive discussion of the term "vacation benefits." The 34-page index to the history in fact contains no reference to "vacation benefits." See Legislative History of the Employee Retirement Income Security Act of 1974, Senate Subcommittee on Labor and Public Welfare (Comm. Print 1976).

to pay them springs from an agreement dealing with vacation. (Resp. Br. 9).

In petitioner's view, the fact that the payments at issue have some nexus to an agreement involving vacation merely poses the question before this Court. The answer requires an understanding of what distinguishes wages paid for work performed from the concept of vacation. Properly analysed, the payments at issue here are virtually identical to wages for work performed and thus do not fall within the scope of benefits Congress sought to regulate.

The essence of a wage is "[p]ayment by an employer of compensation on account of work performed by an employee

. . . ." 29 C.F.R. § 2510.3-1(b)(1) (1987).[3/] By contrast, as the term implies, vacation is at the heart a "vacation benefit." The essence of vacation is the absence from work with the employer's permission.[4/]

That a payment due a salaried employee for working during what could have been vacation time is straight compensation can be graphically illustrated as follows. When an employee is hired at a set annual salary and promised, for

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3/ See also Black's Law Dictionary 1416 (rev. 5th ed. 1979) (Wages. "A compensation given to a hired person for his or her services. Compensation of employees based on time worked or output of production.").

4/ See Black's Law Dictionary, supra, 1388 (Vacation. "A recess or leave of absence; a respite or time of respite from active duty or employment; an intermission or rest period during which activity or work is suspended.").

instance, four weeks of vacation, the employee is in effect being paid for only 48 weeks of actual work, even if the pay is distributed in 52 (or fewer) uniform installments over the entire year.[5/] When that employee does not use some or all of his or her allotted vacation time and instead spends more time working for the employer than is required by the basic employment agreement, the question of additional compensation arises. Unless the employer agrees to allow the employee to take the unused vacation time in a subsequent

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5/ In other words, the salaried employee who takes vacation, i.e., is absent with leave from the workplace, is not actually paid for days spent on vacation; he or she is paid during or over periods including vacation the regular installments due for work performed during the work year.

year or at some point in the future to receive payment for foregone vacation time, the employee effectively goes unpaid for the additional time worked.[6/]

6/ Contrary to respondent's repeated suggestions in his brief (see, e.g., Resp. Br. 7, 21 & n.13, 22, 23, 24, 30), the record in this case does not support the conclusion that the payments at issue were due only upon termination; the record in fact supports the more general conclusion that employees could cash out their accrued vacation, presumably on demand, at any time after vacation was foregone. See J.A. at 19 ("[T]he Bank . . . promised employees payment in lieu of unused vacation time"). Termination is not a condition of receiving the payments at issue in this case. Thus, the parallels drawn by respondent (Resp. Br. 10) and the Supreme Judicial Court (Pet. App. A13) between the vacation payments under the Bank's agreement and severance pay are misplaced. See also Pet. Br. 35-36 & n.8.

Likewise, respondent's discussion about the income tax treatment of the payments at issue here does nothing to assist in resolution of the question

(footnote continued)

An agreement by an employer to make a cash payment to a salaried employee for foregone vacation time therefore is simply an agreement by the employer to compensate the employee for the additional time worked.[7/] This is

(footnote continued)

before the Court (Resp. Br. 11-12). Of course the money paid to employees under the Bank's agreement is taxable as income only upon receipt by the employee. This would be true whether the payments constitute wages or severance pay. Nor is there anything about the fact that the income is deferred to a period subsequent to the period in which it is earned that transforms the money from payment for work performed into a benefit specified in ERISA § 3(1). See Resp. Br. 12.

7/ An agreement by the employer to allow the employee to carry over unused vacation time for later use has similar effect, in that the employee can work less than he or she otherwise would be required to work in a subsequent period while still receiving full salary in that period.

the very essence of a wage. See 29 C.F.R. § 2510.3-1(b)(1).[8/]

If an agreement, like the Bank's, to make payments for unused vacation time were applied to hourly employees, the conclusion would be the same, with only

8/ When unused vacation time is cashed out or used in a later period in which the employee's salary has been increased, the employee is simply being paid at a premium rate for having worked rather than having gone on vacation in the earlier period. This does not change the fact that the payment is pure compensation for time worked. See discussion of 29 C.F.R. § 2510.3-1(b)(1) infra at 10-12.

Even if one conceives of an annual salary as intended not only to compensate the employee for days actually worked but actually to compensate the employee for time spent on vacation as well, the pay received when unused vacation days are cashed out is simply a premium paid by the employer. Analytically, such a payment is identical to premium pay for working at other times, such as weekends, nights or holidays, when the employee is otherwise entitled to be absent from the workplace. See discussion infra at 10-12.

a slight variation. The hourly employee who works during a week he or she otherwise could have been vacationing presumably is paid in the normal course for the hours he or she actually works. When, under the employer's agreement, the employee later takes payment for unused vacation time, the employee will in effect be paid again for that same week. The second payment for the one week of work the employee could have taken, but did not take, as vacation constitutes a premium for the employee having worked on his or her own time.[9/]

9/ If by the time the employee cashes out the unused vacation the wage rate has been increased, this means only that the premium paid is even higher, i.e. more than double time.

Such premium payments fit precisely within the Secretary's common sense definition of compensation that falls outside the ambit of ERISA, which is set forth at 29 C.F.R. § 2510.3-1(b)(1). That provision, the validity of which has not been challenged in this case, specifically excludes from ERISA coverage:

> Payment by an employer of compensation on account of work performed by an employee, including compensation at a rate in excess of the normal rate of compensation on account of performance of duties under other than ordinary circumstances, such as --
> (i) Overtime pay,
> (ii) Shift premiums
> (iii) Holiday premiums,
> (iv) Weekend premiums.

There is no rational basis for distinguishing premium pay for work performed by an employee on a weekend -- time the employee otherwise could have

been away from work -- from premium pay for work performed by an employee on days he or she otherwise could have spent away from work on vacation.[10/]

Accordingly, the pay at issue here -- pay for time worked rather than spent

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10/ The question of whether money paid for time an employee actually spends on vacation constitutes wages or an aspect of a "vacation benefit" is not directly at issue in this case. That is the problem the Secretary addressed by the related regulation, 29 C.F.R. § 2510.3-1(b)(3)(i), which has been much discussed in the parties' and amici's briefs.

In considering respondent's challenge to the validity of this portion of the Secretary's regulation, it is worth noting that, for bankruptcy purposes, Congress has equated vacation pay with wages and salaries and distinguished it from benefits covered by employee benefit plans. Under 11 U.S.C. § 507(a), unsecured claims for "wages [and] salaries . . . including vacation . . . pay" are given third priority while unsecured claims for contributions to "employee benefit plans" are fourth priority.

on vacation -- is properly viewed as a wage and not a "vacation benefit." It therefore does not constitute one of the benefits specified in ERISA § 3(1) and the agreement to pay it is not an "employee benefit plan."[11/]

11/ Petitioner's interpretation of "vacation benefits" does not deprive the term of meaning. In addition to encompassing pooled or aggregated contributions toward employee vacations, and the irrevocable deferral of vacation wages to or beyond the termination of employment (Pet. Br. 38-40), the term also would contemplate the underlying right to be absent from the workplace (whether or not with pay) and such vacation-related benefits as use of a company-owned condominium in a vacation location, the use by employees for vacation of company-earned frequent flyer credits, and perhaps the right to convert a portion of unused sick time into extra vacation days.

Further, for the reasons stated by the Solicitor General (S.G. Br. 16 n.9) and the Ninth Circuit, California Hosp. Ass'n v. Henning, 770 F.2d 856, 861 (9th Cir. 1985), modified, 783 F.2d 946 (9th Cir.), cert. denied, 477 U.S. 904

(footnote continued)

B. The Bank's Agreement to Make Payments For Unused Vacation Time Requires No More Than Ordinary Payroll Administration.

Respondent's analysis assumes that any arrangement that necessitates some activity by the employer to perform his obligations, no matter how minimal that activity might be, is ipso facto a "plan". (Resp. Br. 21-24). This assumption ignores the teaching of Fort Halifax Packing Co., Inc. v. Coyne, No. 86-341, slip op. at 4-5 (June 1, 1987), by failing to acknowledge that not every arrangement for delivery of a benefit

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(footnote continued)

(1986), respondent's argument (Resp. Br. 14), relying on 29 U.S.C. § 186(c)(6), that a benefit plan delivering vacation benefits must be other than a "pooled" vacation plan is without merit.

enumerated in ERISA § 3(1), is an employee welfare benefit plan. See also ERISA § 514(b)(6)(B) (indicating not all arrangements qualify as a plan, fund or program).

Petitioner contends that the proper inquiry is whether the provision of a particular benefit necessitates administrative activity beyond that which is required to maintain a simple payroll. Ordinary payroll administration is baseline activity that ERISA is not intended to control in any way.

In Fort Halifax, this Court declared that an arrangement that does not by its nature require some ongoing administrative scheme on the part of the employer does not implicate the concerns that prompted preemption and thus is not

a "plan, fund or program." Slip op. at 9. The Court held that the arrangement in Fort Halifax was not a "plan, fund or program" because it required "no administrative scheme whatsoever." Id. The Court did not mean, however, that the employer was a mere observer to a self-executing severance pay statute. Under the Maine statute, the amount of severance pay due was a function of the number of years the employee had worked for the employer and the employee's usual salary, i.e., each employee was due one week's pay for each year more than three that he or she had worked for the employer. Slip op. at 1 n.1, 2-3. Each employer subject to the law therefore was required to (1) keep track of the length of each employee's service, (2) maintain records of each

employee's weekly wage rate, and (3) make payments to each employee at the facility when due.[12/] See id. In other words, the only administrative structure necessitated by the Maine statute was the one already in place to pay wages.

Mass. Gen. L. ch. 149, § 148 (1982) ("§ 148") requires no more administrative activity than did the statute in Fort Halifax. In respondent's own words, all that the Bank is required to do is "to [1] keep track of time earned by each employee, [2] maintain records of time earned and/or saved, and [3] make payments to individual employees

12/ Presumably, the employer was also obligated to withhold amounts associated with federal and state income tax, FICA, and any other applicable payroll deductions.

upon termination." (Resp. Br. 23-24).[13/] Hence, this case and Fort Halifax are distinguishable with respect to the level of administrative activity required on the single ground that here the Bank may be called upon to pay accrued vacation pay to different employees at different times, while Fort Halifax's duty to pay affected employees ostensibly arose at only one point in time. See slip op. at 9-10. This distinction, however, is of no moment in terms of the purposes or policies underlying either ERISA in general or § 514 specifically.[14/]

Contrary to respondent's contention (Resp. Br. 22), it is not a meaningful distinction in this case that the Maine statute applies only to employees with no preexisting severance pay agreements while § 148 applies to employers who have agreed to make vacation payments. The distinction is only indirectly relevant to the issue of whether there exists a "plan, fund or program"

13/ As aptly noted by the AFL-CIO, if there is any danger of disappointed expectations of employees with respect to pay for unused vacation time, that danger is no different than that which pertains to wages -- a danger Congress chose not to address through ERISA. AFL-CIO Br. 12. See Fort Halifax, slip op. at 12-13 (ERISA is concerned with the abuses associated with the operation of covered administrative schemes).

14/ Indeed, contrary to dicta in the Court's Fort Halifax opinion, whether under the arrangement at issue a single employer could or could not be called upon at more than one point in time to make the payments at issue could not have been determinative in Fort Halifax. For, even there, any employer with more than one "covered facility" in the state would be called upon on more than one occasion to calculate and pay severance pay if it subsequently closed another one of its facilities. See Fort Halifax, slip op. at 1 n.1.

pursuant to ERISA § 3(1). In the context of the "plan" discussion, the fact that the Maine statute applied only to employers without preexisting plans was significant only because the employer was not forced to modify its policies in order to comply with potentially different state-mandated administrative requirements.

The Bank, similarly, is not forced to modify its agreement in order to comply with § 148. Section 148 requires that vacation wages be paid either immediately upon discharge, on the next regular pay day after an employee voluntarily leaves employment, or within six or seven days of the end of the pay period. Under the Bank's agreement, as reflected by the record in this case, pay for unused vacation time was due presumably on demand. Thus, the

distinction between this case and Fort Halifax is a distinction without a difference for purposes of deciding whether the Bank's agreement is a "plan."

The determinative fact in this case is that the Bank's agreement requires it to do absolutely nothing administratively that it would not have to do in any event to pay employees their salaries or wages, which, as all parties agree, are entirely outside of ERISA's reach. The Bank's agreement therefore does not constitute a "plan, fund or program" within the meaning of ERISA § 3(1).[15/]

15/ Contrary to respondent's suggestion (Resp. Br. 31-32), a prosecution under § 148, as opposed to a civil suit by an employee, does not result in payment of promised wages to the employee. The terms of the statute do not authorize such payments nor does it establish the Commonwealth as an employee's collection

(footnote continued)

II. A GENERALLY APPLICABLE CRIMINAL LAW NEED NOT BE ONE OF UNIVERSAL APPLICATION.

Although there is superficial agreement among the participants that the phrase "generally applicable criminal law" found in ERISA § 514(b)(4) is properly interpreted to mean: a criminal law which is not specifically aimed at employee benefit plans,16/ respondent

(footnote continued)

agent. Rather, by authorizing the assessment of fines or imprisonment, it seeks to deter employer conduct that can cause social dislocation. The observation that § 148 may increase the likelihood that a worker will get what he or she is promised is not a reason for concluding that the statute is nothing more than a benefit collection device.

16/ See Resp. Br. 28, quoting Commonwealth v. Federico, 383 Mass. 485, 490, 419 N.E.2d 1374, 1377-78 (1981);

(footnote continued)

and the Solicitor General suggest by example a test for determining what is a "generally applicable criminal law" that

(footnote continued)

S.G. Br. 24; St. Br. 13. Indeed, the Department of Labor repeatedly has interpreted "generally applicable criminal law" under § 514(b)(4) to mean a law that is not intended to apply specifically to ERISA benefit plans. See, e.g., Department of Labor ERISA Opinion Letter No. 84-06A (January 17, 1984) (Colorado Consumer Credit Code imposing criminal penalties upon certain lenders for willfully making loans at usurious interest rates is a generally applicable criminal law, even though it could be applied to loans made from ERISA-covered trust funds, because it is "not intended to apply specifically to activity related to employee benefits plans"); Department of Labor ERISA Opinion Letter No. 79-35A (May 31, 1979) (Massachusetts Health, Welfare and Retirement Funds' Law is not a generally applicable criminal law because it is applicable "only to employee welfare and pension benefit plans"). The lower courts have done likewise. See, e.g., Sforza v. Kenco Constructional Contracting, Inc., 674 F. Supp. 1493, 1494-95 (D. Conn. 1986) and cases cited therein.

would give the § 514(b)(4) exemption such narrow scope as to render it virtually meaningless. The petitioner's proposed test (Pet. Br. 66), in contrast, gives content to and is consistent with the intended purpose of § 514(b)(4).

The respondent and apparently the Solicitor General suggest that only statutes that are applicable to _every single citizen of a state_, _i.e._, are _universally_ applicable, are saved from preemption by § 514(b)(4). (_See_ Resp. Br. 27; S.G. Br. 25-26).[17/] Under this reasoning, however, not even a criminal law prohibiting embezzlement, which respondent, the Solicitor General,

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17/ _Cf. Commonwealth v. Federico_, 383 Mass. at 490, 419 N.E.2d at 1378 (stating that a theft statute "applicable to the entire population" qualifies under § 514(b)(4)).

and all courts that have addressed this issue agree should be saved from preemption, would be "a generally applicable criminal law."[18/] Only the class of citizens in positions of trust with respect to the appropriated property can be guilty of embezzlement; such a relationship is a necessary element of the crime. _See generally_ Black's Law Dictionary 468-69 (rev. 5th ed. 1979).[19/] Thus, the fact that

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18/ _See_ Resp. Br. 28-29; S.G. Br. 23-24; Pet. Br. 64; _see also Sforza v. Kenco Contracting, Inc._, 674 F. Supp. at 1495 and cases cited therein.

19/ Indeed, often there are separate embezzlement statutes to be applied to different categories of citizens. _See, e.g._, Mass. Gen. L. ch. 266, § 32 (embezzlement by captain of vessel), § 56 (embezzlement by brokers), § 57 (embezzlement by conservators and fiduciaries); _see also_ 18 U.S.C. § 663 (embezzlement by solicitation), § 665

(footnote continued)

§ 148 is applicable to a group of citizens comprised of fewer than all citizens, e.g., employers only, cannot be decisive of the issue of whether it is a "generally applicable criminal law."

Nor should the fact that § 148 is addressed specifically to the

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(footnote continued)

(theft or embezzlement from manpower funds). Under respondent's rationale, none of these statutes would qualify as a "generally applicable criminal law," yet a single statute prohibiting embezzlement in each of the contexts covered by the individual statutes would. To conclude that preemption is avoided simply because the state legislature chose to enact one general embezzlement statute or, alternatively, to leave the matter to common law would be to attribute to Congress a concern only with the form rather than the substance of state criminal statutes, and would ignore the fact that the § 514(b)(4) exemption by its terms is not limited to state common law.

employer-employee relationship be controlling here. ERISA does not govern all aspects of the employer-employee relationship. It does not, for instance, regulate the payment of wages or the hiring or firing of employees. To interpret § 514(b)(4) to exclude from its coverage any and every law specifically directed at the employer-employee relationship, or at employers as a class, therefore would be wholly divorced from the purposes of ERISA.

The Solicitor General suggests that if the Bank's agreement is an ERISA plan then § 148 must not be a "generally applicable criminal law."[20/] The

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20/ See S.G. Br. 29 ("State laws such as these, if applied to employee benefit plans . . ." would defeat the goal of ERISA) (emphasis added); see also id. 23-24.

Solicitor General fails, however, to explain why such an "if applied" analysis would not lead to preemption even of larceny and embezzlement laws, which he concedes should be saved from preemption by § 514(b)(4) (see S.G. Br. 23-24), but which certainly can be applied to ERISA plans. Indeed, were the meaning of § 514(b)(4) to be discerned through an "if applied" analysis, then no law otherwise preempted under § 514(a) would ever be exempted from preemption by § 514(b)(4).[21/]

21/ As this Court has noted, a rule of construction that would make § 514(b)(4) superfluous or a nullity must be rejected. Shaw v. Delta Airlines, Inc., 463 U.S. 85, 98 (1983) ("It would have been unnecessary to exempt generally applicable state criminal statutes from pre-emption in § 514(b), for example, if § 514(a) applied only to state laws dealing specifically with ERISA plans").

The petitioner's proposed test avoids the pitfalls created by the alternatives that have been advanced without causing § 514(b)(4) to be overly broad. Under petitioner's test (see Pet. Br. 66), a "generally applicable criminal law" is a law that applies to all members of a class that is so defined that any member of the class could commit the prohibited criminal conduct in a context that would not implicate an ERISA plan.[22/]

22/ Here, because any employer could be found in violation of § 148 for nonpayment of wages without in any way implicating an employee benefit plan, § 148 is a "generally applicable criminal law." In contrast, a statute aimed specifically at the failure to make contributions to a benefit plan or at the failure periodically to disclose assets held in trust for purposes of paying pension, health or disability benefits would not constitute a "generally applicable criminal law."

The respondent and the Solicitor General ask this Court to presume that a statute is not a "generally applicable criminal law" if it can be applied to employee benefit plans.[23/] The petitioner's test, however, is more faithful to the federalism concerns underlying the exceptions to preemption set forth in § 514(b).[24/] Congress,

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23/ The Court below adopted a variation of this same negative presumption by concluding that § 148 is not a law of general application because it can be applied to vacation payments which will "often" be paid pursuant to ERISA plans. See Pet. App. A31-A32.

24/ Even in the context of ERISA's preemption provision, this Court has never abandoned its presumption "that Congress did not intend to pre-empt areas of traditional state regulation." Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 740 (1985); see also Fort Halifax, slip op. at 16 ("ERISA preemption analysis must be guided by respect for the separate spheres of governmental authority preserved in our fe eralist system") (interior quotes omitted).

as all parties here agree, intended to allow state criminal laws to operate, even with respect to employee benefit plans, as long as such laws were not specifically aimed at ERISA plans. (See supra at 22). By exempting from preemption generally applicable state criminal laws, as opposed to state civil laws, Congress obviously sought to preserve to the States the power to regulate by criminal law conduct that they cannot regulate by civil statutes. It is highly implausible that Congress would have chosen the relatively unbounded language of § 514(b)(4) if it intended to preserve from preemption only embezzlement and larceny statutes applicable to every single citizen in the state.

The Solicitor General's fears about the scope of the test offered by petitioner are unfounded. He speculates that if petitioner's test is adopted state legislatures will attempt to circumvent ERISA's preemption provision by criminalizing nonpayment of wages in a variety of statutes otherwise directed at ERISA plans. (S.G. Br. 24 n.15). This argument presupposes that state legislatures will intentionally manipulate their criminal codes with no real purpose other than to subvert congressional intent. Even were such intentional circumvention a legitimate concern, no test, including respondent's and the Solicitor General's, could prevent its occurrence, unless

§ 514(b)(4) is to be drained of all meaning.[25/]

Second, even if a statute qualifies as a "generally applicable criminal law" and thus is exempted from preemption by § 514(a)'s "occupation of the field," that same statute is not thereby immunized from preemption under an "actual conflict" analysis. An "actual conflict" occurs when compliance with both federal and state law is impossible, Florida Lime & Avocado Growers, Inc. v.

25/ For example, if the respondent's or the Solicitor General's test were adopted, a state legislature could presumably avoid preemption by enacting a criminal statute that provides: Any person who appropriates the property of another by any means, including, but not limited to, the failure to make promised contributions to a benefit plan, is guilty of larceny. Such a statute, although motivated by the legislature's desire to circumvent ERISA, would escape preemption because it would apply to all citizens in the state and be a single general larceny statute.

Paul, 373 U.S. 132, 142-43 (1963), or when state law stands as an obstacle to the objective of Congress, *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). No such conflict exists between § 148 and ERISA. Employers can comply both with § 148's requirements regarding payment of wages and ERISA's requirement of payment of benefits due within a reasonable time. *See* 29 C.F.R. § 2560.503-1(e)(3).

In addition, a statute like § 148 is consistent with the congressional purpose of assuring that employee expectations of receiving promised benefits are realized. Nor do the criminal penalties imposed pursuant to "generally applicable criminal law" necessarily stand as an obstacle to the "exclusivity" objective of ERISA. Any

"generally applicable criminal law" will, by definition, supplement ERISA's civil provisions. Thus, the Solicitor General's observation (S.G. Br. 26-27) that § 148 will result in a greater likelihood that a worker will get the benefits he or she is promised -- a result that could be effected by a private enforcement action under ERISA -- is not a reason for preempting the statute. Section 148 is no more an impermissible supplement to ERISA's provisions than is a generally applicable embezzlement statute that could be applied to punish misappropriation of pension funds.

CONCLUSION

The Commonwealth of Massachusetts respectfully requests that the decision below of the Supreme Judicial Court of Massachusetts be reversed and that this Court rule that ERISA does not preempt the Commonwealth from prosecuting respondent pursuant to Mass. Gen. L. ch. 149, § 148.

Respectfully submitted,

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